

**Laborers' District Council of Western Pennsylvania
a/w Laborers' International Union of North
America, AFL-CIO and Harris Masonry Com-
pany and International Union of Operating En-
gineers, Local 66, AFL-CIO. Case 6-CD-881**

June 10, 1991

**DECISION AND DETERMINATION OF
DISPUTE**

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

The charge in this Section 10(k) proceeding was filed on October 22, 1990, by Harris Masonry, Inc. alleging that the Respondent, Laborers' District Council of Western Pennsylvania a/w Laborers' International Union of North America, AFL-CIO (Laborers) violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing Harris Masonry, Inc. to assign certain work to employees it represents rather than to employees represented by International Union of Operating Engineers, Local 66, AFL-CIO (Operating Engineers). The hearing was held November 30, 1990, before Hearing Officer Barton A. Meyers.

I. JURISDICTION

Harris Masonry, Inc., a Pennsylvania corporation, is engaged as a masonry contractor in commercial and industrial construction. Harris Masonry, Inc. has an office and place of business located in the Commonwealth of Pennsylvania. During the most recent 12-month period, Harris has performed services valued in excess of \$50,000 on jobsites located outside the Commonwealth of Pennsylvania. During the same period, Harris purchased goods and materials valued in excess of \$50,000 directly from suppliers located outside the Commonwealth of Pennsylvania. The parties stipulate, and we find, that Harris Masonry, Inc. is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Laborers and Operating Engineers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of Dispute¹

In September 1990, Harris Masonry, Inc. commenced work as a subcontractor for general contractor Dick Corporation at the construction site of a medical office building, South Hills Health System, located at the Jefferson Hospital in Pittsburgh, Pennsylvania. Harris Masonry, Inc. performs the brick and block ma-

sonry work on the job. A large type of forklift, the "Pettibone" or "Lull" forklift, is used to raise materials to scaffolding at the upper stories of the building under construction. It is the operation of the forklift that is in dispute.

Lee Harris is the president of Harris Masonry, Inc., which is signatory to a collective-bargaining agreement with the Laborers. On commencing work at the South Hills Health System project, Harris Masonry, Inc. assigned the work of operating the forklift to employees represented by the Laborers. About October 12, 1990, after learning of this assignment, Operating Engineers, which has a collective-bargaining agreement with Dick Corporation, contacted Dick Corporation indicating that it would file a grievance alleging that Dick Corporation had violated the subcontracting clause of its agreement with the Operating Engineers by allowing this assignment of the work by subcontractor Harris. Thereafter, Jerry Horn, senior project manager for Dick Corporation, advised Harris Masonry, Inc. of this contact by Operating Engineers Local 66. Horn indicated that it was Dick Corporation's intention to hold Harris Masonry, Inc. responsible for any successful claim against it by the Operating Engineers. Subsequently, the Laborers learned of these actions by the Operating Engineers and on October 19, 1990, Paul Quarantillo, assistant business agent for Laborers, telephoned Lee Harris and informed him that should the job of operating the forklift be reassigned to employees represented by the Operating Engineers, the Laborers would take "the appropriate action, which would include picketing of the project site" to preserve the work for its members. Thereafter, on October 22, 1990, Harris Masonry, Inc. filed the subject unfair labor practice charge. The work has remained with employees represented by the Laborers.

B. Work in Dispute

The disputed work involves the operation of a Pettibone or Lull forklift for the purpose of raising materials onto scaffolding in the course of the construction of a new medical office building at the Jefferson Hospital site located in the South Hills area of Pittsburgh, Pennsylvania.

C. Contentions of the Parties

Harris Masonry, Inc. contends the disputed work should be awarded to employees represented by the Laborers on the basis, inter alia, of its collective-bargaining agreement with the Laborers, its preference and past practice, and economy and efficiency. The Laborers asserts that it should be awarded the disputed work on the basis of its collective-bargaining agreement and area practice. Both Harris Masonry, Inc. and the Laborers seek an award of the disputed work to

¹ Prior to the hearing, the hearing officer was notified by counsel for the Operating Engineers that it did not intend to appear or be represented at the hearing concerning the instant matter. Neither then nor at any other time did the Operating Engineers request postponement of the proceeding or register any objection to its going forward.

employees represented by the Laborers on its jobsites throughout western Pennsylvania.

As noted, the Operating Engineers did not appear at the hearing or submit a statement of position regarding the assignment of the disputed work.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have no agreed-upon method for the voluntary adjustment of the dispute.

As stated above, it is undisputed that about October 19, 1990, the Laborers' assistant business agent Quarantillo informed Harris Masonry, Inc. that if it re-assigned the disputed work to employees represented by the Operating Engineers, the Laborers would take appropriate action including picketing the jobsite. We find an object of the Laborers' conduct was to force Harris Masonry, Inc. to maintain the assignment of the disputed work to employees it represents. The parties stipulated at the hearing and we find that there is no agreed-upon method for the voluntary adjustment of the dispute.

We find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed-upon method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. *Certifications and collective-bargaining agreements*

There is no evidence that either the Laborers or the Operating Engineers has been certified as the exclusive collective-bargaining representative of any of Harris Masonry, Inc.'s employees. As stated above, however, Harris Masonry, Inc. is signatory to a collective-bargaining agreement with the Laborers. Article IV, section 2, of the Laborers' most recent contract with Harris Masonry, Inc. provides that the Laborers' jurisdiction covers, among other things, tending masons. Such

tending includes supplying and conveying materials to mechanics, "whether by bucket, hod, wheelbarrow, buggy, or other motorized unit used for such purpose including forklifts."² Harris Masonry, Inc.'s agreement with Laborers also includes a broad claim for work in article II, section 1(b), that provides: "There shall be no restriction of the use of any machinery or tools when furnished by the Employer."

As noted, the Operating Engineers did not participate in the hearing and therefore there is no evidence regarding whether its collective-bargaining agreement (albeit not binding on Harris Masonry) contains any claim for this work. Accordingly, we find this factor favors an award to employees represented by the Laborers.

2. *Employer preference and past practice*

The record establishes that throughout the years Harris Masonry, Inc. has assigned the disputed work to employees represented by both Unions. However, since mid-1988, Harris Masonry, Inc. has assigned the disputed work exclusively to the employees represented by the Laborers and it indicates that this is its present preference. Accordingly, these factors favor an award of the disputed work to employees represented by the Laborers.

3. *Area practice*

Testimony presented at the hearing shows that the disputed work is identical to that traditionally assigned by other contractors in the area to employees represented by the Laborers. Harris, who is president of the Mason Contractors Association of Western Pennsylvania, an organization having approximately eight members, testified that all but one of the members exclusively assign the work in question to employees represented by the Laborers. Accordingly, this factor favors an award of the disputed work to employees represented by the Laborers.

4. *Economy and efficiency of operation*

Harris testified that he assigned the disputed forklift work to employees represented by the Laborers in part because a forklift does not need to be operated every day, 8 hours a day. During times when the forklift is not in operation, the employee represented by the Laborers who is assigned to the operation of the forklift can perform a variety of other productive tasks while an employee represented by the Operating Engineers cannot. Harris testified that prior to 1988, before Harris Masonry, Inc. began exclusively assigning the disputed work to employees represented by the Laborers, Harris Masonry, Inc. did not use a forklift frequently because

²The most recent collective-bargaining agreement removed a height restriction contained in the former contract whereby Laborers' jurisdiction applied to forklifts only when used at a level not exceeding one floor.

it was inefficient to do so using an employee represented by Operating Engineers. Therefore, the Company performed the work now performed by the Pettibone or Lull forklift using either walk-behind forklifts or manually, far less productive and efficient methods. Further, Harris testified that the Operating Engineers contracts have a provision guaranteeing a 40-hour workweek, a clause not included in the Laborers' contract.

Because the Operating Engineers presented no evidence showing that it would be as efficient or economical to utilize employees represented by it to perform the disputed work, we find that this factor favors awarding the disputed work to employees represented by Laborers.

Conclusions

After considering the above relevant factors, we conclude that employees represented by the Laborers' District Council of Western Pennsylvania a/w Laborers' International Union of North America, AFL-CIO, are entitled to perform the work in dispute. We reach this conclusion relying on the factors of the collective-bargaining agreements, the Company's preference and past practice, area practice, and economy and efficiency of operations. In making this determination, we

are awarding the work to employees represented by the Laborers, not to that Union or its members.

Harris Masonry, Inc. contends that the Board should issue a broad award to employees the Laborers represents on Harris' jobsites throughout western Pennsylvania. We conclude that a broad order is not warranted. The Operating Engineers did not engage in picketing or threats of picketing; rather, it was the Laborers that threatened to picket this particular jobsite to maintain assignment of the disputed work to employees it represents. In these circumstances, there is no basis for extending the determination beyond the particular controversy that gave rise to this proceeding.³

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following determination of dispute.

Employees of Harris Masonry, Inc. represented by Laborers' District Council of Western Pennsylvania a/w Laborers' International Union of North America, AFL-CIO, are entitled to perform the Pettibone or Lull forklift work at the Jefferson Hospital site located in the South Hills area of Pittsburgh, Pennsylvania.

³ *Laborers Local 373 (Friday Masonry)*, 288 NLRB 1220 (1988); *Laborers Local 1086 (Dentinger, Inc.)*, 282 NLRB 633 (1987).